Supreme Court, U.S.
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No. 95 11 22

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

MICHAEL SCOTT THOMAS,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

Petition for a Writ of Certiorari to the Court of Appeals for the Eighth District of Texas

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Petitioner was deprived of a meaningful opportunity to present a complete defense in that the Petitioner was deprived of presenting evidence from a co-defendant that such co-defendant was solely criminally responsible.

LIST OF ALL PARTIES TO THE PROCEEDING

The parties to the proceeding below were the petitioner and defendant below, Michael Scott Thomas, and the respondent to the Petition, the State of Texas. In addition, Ramsey Harrell was charged in a separate indictment with the same offenses as petitioner.

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United States Constitution

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PETITION FOR WRIT OF CERTIORARI

Petitioner, MICHAEL SCOTT THOMAS, requests that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Eighth District of Texas entered in this proceeding on July 20, 1995. The Court of Criminal Appeals of Texas refused discretionary review on November 15, 1995. Such refusal of discretionary review became final on November 15, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth District of Texas is not reported, and set out in pages

1a-9a of the appendix. The order of the Texas Court of Criminal Appeals is not reported, but is set out on page 10a of the appendix.

JURISDICTION

The opinion of the Court of Appeals for the Eighth District of Texas was entered on July 20, 1995. The Texas Court of Criminal Appeals, the state court of last resort, refused discretionary review on November 15, 1995. The refusal of discretionary review became final on November 15, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following provisions of the United States Constitution, which are provided in relevant part.

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

United States Constitution, Amendment XIV, Section 1:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

Appellant was charged by indictment with three counts, namely, Capital Murder, Aggravated Robbery, and Unauthorized Use of A Motor Vehicle. Trial was to a jury, with the jury finding Appellant not guilty of Capital Murder, but guilty of Aggravated Robbery. Punishment was assessed by the jury at nine (9) years imprisonment. Timely appeal was perfected to the El Paso Court of Appeals.

The Court of Appeals for the Eighth Supreme District in El Paso, Texas rendered its decision and delivered its opinion in this case on July 20, 1995, affirming the conviction. No Motion for Rehearing was filed pursuant to Rule 100, Texas Rules of Appellate Procedure, nor did the Court of Appeals order an *en banc* reconsideration of the decision on its own motion, pursuant to Rule 100 (f), Texas Rules of Appellate Procedure.

A Petition for Discretionary Review was timely filed with the Texas Court of Criminal Appeals. The Texas Court of Criminal Appeals refused to grant Petitioner's Petition for Discretionary Review on November 15, 1995.

Statement of Facts. The basic scenario of the facts adduced during the trial of the case at bar can be summarized as follows: (1) the co-defendant, Ramsey Harrell, had a falling out with his mother, and was packing his things to move to a friend's house in Amarillo, Texas; (2) the co-defendant was upset and frustrated; (3) Petitioner knew his co-defendant, Ramsey Harrell, from school in Midland; (4) Petitioner and the co-defendant lived about one mile apart; (5) Petitioner lived with his father in a mobile home in the KOA campground; (6) on the date in question Petitioner's father, who went to work as a truck driver and would not be back for a day or two, had given Petitioner $50.00 to spend; (7) Petitioner and his father knew Jerry Hon and Tommy Musick, who lived together and were neighbors, and they were all friends, and often played cards together; (8) neither Pe-

titioner nor the co-defendant had a car, but had to depend on friends to get around or walk or ride a bicycle; (9) the co-defendant told Petitioner of the co-defendant's desire to move to Amarallo; (10) co-defendant and Petitioner agreed to let co-defendant spend that night at Petitioner's house rather than going alone to Amarillo; (11) Petitioner went to the home of the co-defendant and, rather than carry co-defendant's belongings all the way to Petitioner's home, Petitioner telephoned Jerry Hon for a ride to Petitioner's home, and when Hon declined, Petitioner asked Tommy Musick for a ride, to which Musick replied he would; (12) as he always did, Musick carried with him outside the home a black bag, similar to what most men would carry in their wallet, and did have some money inside the black bag; (13) upon picking up Petitioner and co-defendant, the co-defendant, Ramsey Harrell, got into the back seat of the car and the Petitioner sat in the right front passenger seat; (14) from the back seat, the co-defendant pulled out a firearm and shot Tommy Musick in the head four times and took his black bag, with no testimony that Petitioner had any knowledge that the co-defendant possessed any firearm nor any testimony of any knowledge that the co-defendant had the intention of robbing Tommy Musick; (15) the co-defendant then ordered Petitioner to put Musick's body into the back seat, and then the co-defendant drove the car to a remote area in western Midland County, Texas where the co-defendant, including ordering Petitioner around, caused Musick's body to be in a field; (16) the co-defendant drove Musick's vehicle again and, upon stopping, ordered Petitioner to assist in wiping blood stains from Musick's vehicle; (17) the co-defendant then did not want Petitioner out of his sight and forced Petitioner to travel with him to the co-defendant's home; (18) the co-defendant's mother was home at that time, and the three of them went to Whataburger around midnight. At the Whataburger, Petitioner was not hungry and threw up more than once in the men's restroom; (19) the three of them then returned to the co-defendant's home, as the

co-defendant would not allow Petitioner out of his sight; (20) Jerry Hon subsequently talked to the police since Tommy Musick had been missing, and told the police that Musick had left the home to give the Petitioner and the co-defendant a ride; (21) a deputy sheriff with the Midland County Sheriff's Department shortly thereafter went to the home of the co-defendant, and the co-defendant's mother indicated that her son and the Petitioner were in the residence in the co-defendant's bedroom; (22) Petitioner and the co-defendant were split up and taken separately to the Midland County Sheriff's Department, where they each gave statements; (23) the co-defendant, Ramsey Harrell, had his jury trial first, and was found guilty of murder and assessed a 12 year sentence; (24) it is very obvious that the co-defendant, Ramsey Harrell, testified in his own defense at his jury trial, and obviously indicated that Petitioner did not encourage the co-defendant to shoot and rob Musick, and Petitioner was not criminally responsible at all for the shooting and robbing of Tommy Musick under the law of parties, but that the co-defendant was solely responsible, including the fact that the Petitioner had no knowledge that the co-defendant had a firearm, and did not assist or aid the co-defendant in any way; and, (25) the co-defendant, Ramsey Harrell, was called as a witness at trial, but refused to answer any questions, and was held in contempt of court twenty-six (26) times.

REASON FOR GRANTING THE WRIT

This case presents an important question concerning whether the Petitioner was deprived of a meaningful opportunity to present a complete defense because he was deprived of presenting evidence from the co-defendant. That such co-defendant was solely criminally responsible, in violation of his rights under the due process clause of the Fourteenth Amendment, as well as his right of confrontation under the Sixth Amendment.

As to the Question Presented, with regard to the rights of an accused to set forth a defense to the criminal accusation, this Court has stated the following:

> "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi,* 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973), or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington v. Texas,* 388 U.S. 14, 23, 87 S.Ct. 1920, 1925, 18 L.Ed.2d 1019 (1967); *Davis v. Alaska,* 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), the Constitution guarantees criminal defendants "a meaningful opportunity to present a *complete* defense." (emphasis supplied)

Crane v. Kentucky, 476 U.S. 683, 106 S.Ct. 2142, 2146, 90 L.Ed.2d 636 (1986).

Very importantly, as the United States Supreme Court established in *Chambers v. Mississippi, supra,* the due process rights of an accused are clearly violated when the defendant is not given the opportunity to present evidence that a third person was solely responsible for commission of the offense for which the accused is standing trial, regardless of the rules of evidence of the state wherein the prosecution occurs.

Bearing in mind the holdings of *Crane v. Kentucky* and *Chambers v. Mississippi,* the basic scenario of the facts adduced during the trial of the case at bar can be summarized as follows: (1) the co-defendant, Ramsey Harrell, had a falling out with his mother, and was packing his things to move to a friend's house in Amarillo, Texas; (2) the co-defendant was upset and frustrated; (3) Petitioner knew his co-defendant, Ramsey Harrell, from school in Midland; (4) Petitioner and the co-defendant lived about one mile apart; (5) Petitioner lived wih his father in a mobile home in the KOA campground; (6) on the date in question Petitioner's father, who went to work as a truck driver and would not be back for a day or two, had given Petitioner $50.00 to spend; (7)

Petitioner and his father knew Jerry Hon and Tommy Musick, who lived together and were neighbors, and they were all friends, and often played cards together; (8) neither Petitioner nor the co-defendant had a car, but had to depend on friends to get around or walk or ride a bicycle; (9) the co-defendant told Petitioner of the co-defendant's desire to move to Amarillo; (10) co-defendant and Petitioner agreed to let co-defendant spend that night at Petitioner's house rather than going alone to Amarillo; (11) Petitioner went to the home of the co-defendant and, rather than carry co-defendant's belongings all the way to Petitioner's home, Petitioner telephoned Jerry Hon for a ride to Petitioner's home, and when Hon declined, Petitioner asked Tommy Musick for a ride, to which Musick replied he would; (12) as he always did, Musick carried with him outside the home a black bag, similar to what most men would carry in their wallet, and did have some money inside the black bag; (13) upon picking up Petitioner and co-defendant, the co-defendant, Ramsey Harrell, got into the back seat of the car and the Petitioner sat in the right front passenger seat; (14) from the back seat, the co-defendant pulled out a firearm and shot Tommy Musick in the head four times and took his black bag, with no testimony that Petitioner had any knowledge that the co-defendant possessed any firearm nor any testimony of any knowledge that the co-defendant had the intention of robbing Tommy Musick; (15) the co-defendant then ordered Petitioner to put Musick's body into the back seat, and then the co-defendant drove the car to a remote area in western Midland County, Texas where the co-defendant, including ordering Petitioner around, caused Musick's body to be in a field; (16) the co-defendant drove Musick's vehicle again, and upon stopping, ordered Petitioner to assist in wiping blood stains from Musick's vehicle; (17) the co-defendant then did not want Petitioner out of his sight and forced Petitioner to travel with him to the co-defendant's home; (18) the co-defendant's mother was home at that time, and the three of them went to Whataburger around midnight. At

the Whataburger, Petitioner was not hungry and threw up more than once in the men's restroom; (19) the three of them then returned to the co-defendant's home, as the co-defendant would not allow Petitioner out of his sight; (20) Jerry Hon subsequently talked to the police since Tommy Musick had been missing, and told the police that Musick had left the home to give the Petitioner and the co-defendant a ride; (21) a deputy sheriff with the Midland County Sheriff's Department shortly thereafter went to the home of the co-defendant, and the co-defendant's mother indicated that her son and the Petitioner were in the residence in the co-defendant's bedroom; (22) Petitioner and the co-defendant were split up and taken separately to the Midland County Sheriff's Department, where they each gave statements; (23) the co-defendant, Ramsey Harrell, had his jury trial first, and was found guilty of murder and assessed a 12 year sentence; (24) it is very obvious that the co-defendant, Ramsey Harrell, testified in his own defense at his jury trial, and obviously indicated that Petitioner did not encourage the co-defendant to shoot and rob Musick, and Petitioner was not criminally responsible at all for the shooting and robbing of Tommy Musick under the law of parties, but that the co-defendant was solely responsible, including the fact that the Petitioner had no knowledge that the co-defendant had a firearm, and did not assist or aid the co-defendant in any way; and, (25) the co-defendant, Ramsey Harrell, was called as a witness at trial, but refused to answer any questions, and was held in contempt of court twenty-six (26) times.

Although the current counsel for Petitioner was not his trial attorney nor represented Petitioner at the Court of Appeals, it is obvious from reading the entire record that the trial court would only permit the prior testimony of co-defendant, Ramsey Harrell, to be presented to the jury *if* Ramsey Harrell answered questions presented to him and, if he answered questions during the Petitioner's jury trial, which was subsequent to Harrell's jury trial, would the jury be informed of and consider that Ramsey Harrell

had testified at Harrell's own trial, that Harrell was solely responsible for commission of aggravated robbery, as well as the shooting of the victim, Tommy Musick, and that Petitioner was not a participant in the shooting and robbing of Tommy Musick, did not encourage such co-defendant to shoot and rob Tommy Musick, that Harrell and Petitioner did not act together, and that Petitioner did not contribute at all toward execution of the shooting and robbing of Tommy Musick and that there was no common purpose (as Petitioner had neither knowledge that Tommy Musick was going to be robbed and shot nor had Petitioner agreed to participate in any such crime). Thus, and so very importantly, the jury in this case was never allowed to hear testimony of Ramsey Harrell at his own trial, that Petitioner was not a party to the shooting and robbing of Tommy Musick, that Ramsey Harrell acted alone in the shooting and robbing of Tommy Musick, that Petitioner never encouraged Ramsey Harrell to shoot and rob Tommy Musick, and had no knowledge whatsoever that Ramsey Harrell had plans to shoot and rob Tommy Musick. Because the jury was never permitted to hear the prior testimony of Ramsey Harrell, namely, that Petitioner was not guilty as a party to the offense of Aggravated Robbery for which he stood trial in this cause, Petitioner has clearly been deprived of a meaningful opportunity to present a *complete* defense, as *Crane v. Kentucky* and *Chambers v. Mississippi* mandate.

As further stated by the United States Supreme Court in *Crane v. Kentucky*, 106 S.Ct. at 2146-2147:

> "We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard *In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 507-508, 92 L.Ed.2d 682 (1948); *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed.2d 1363 (1914) . . . exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutors case encounter and 'survive' the crucible of meaningful adversarial testing.' *United States v. Cronic*, 466 U.S. 648, 656,

104 S.Ct. 2039, 2045, 80 L.Ed.2d 657 (1984). See also *Washington v. Texas, supra,* 388 U.S., at 22-23, 87 S.Ct. at 1924-1925."

Accordingly, by refusing to permit the jury to hear the prior testimony of Ramsey Harrell, to-wit: that Petitioner had no knowledge, did not agree, and did not participate in the shooting and robbing of Tommy Musick, and that the such co-defendant was solely criminally responsible for the shooting and robbing of Tommy Musick, the following rights of the Petitioner have been clearly violated: (1) the due process rights of the Petitioner under the Fourteenth Amendment, Article 1, Section 19 of the Texas Constitution, and Article 1.04, Texas Code of Criminal Procedure; (2) his rights of confrontation under the Sixth Amendment, Article 1, Section 10 of the Texas Constitution, and Article 1.05, Texas Code of Criminal Procedure; and, (3) his rights to compulsory process under the Sixth Amendment, Article 1, Section 10 of the Texas Constitution, and Article 1.05, Texas Code of Criminal Procedure.

Consequently, this Petition for Writ of Certiorari should be granted, the decision of the Texas Court of Appeals, Eighth District, should be reversed, and a new trial should be ordered.

CONCLUSION

For the reasons set forth above, this Court should grant the petition for writ of certiorari to the Court of Appeals for the Eighth District of Texas.

Respectfully submitted,

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